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Masih Perviaz (W/Pakistan) v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-26–01 OF 2018
KAMALUDIN MD SAID, GUNALAN MUNIANDY AND NORDIN HASSAN JJCA
28 JANUARY 2022

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Criminal Procedure — Appeal — Appeal against conviction and sentence — High Court found the appellant guilty of trafficking in dangerous drugs and sentenced him to death — Whether there was serious doubt of identity of drug exhibits — Whether there was a break in chain of evidence — Whether trial judge failed to direct his mind to which provision the appellant was to enter defence and under what provision the appellant was convicted — Whether trial judge erred in deciding that the appellant's defence was an afterthought, bare denial and not credible — Whether trial judge misdirected himself — Whether conviction for drug trafficking was safe — Whether prosecution had established possession of drugs — Dangerous Drugs Act 1952 ss 12(2), 39A(2) & 39B

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This was the appellant's appeal against the decision of the High Court in finding him guilty of the charge of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') and sentencing him to death. The appellant was a Pakistani who was arrested upon arrival at KLIA Sepang together with two other individuals. Upon the arrest, all three were taken to the narcotic office on in KLIA for further investigation. After half an hour, they were brought to Banting hospital. At the hospital, the three were handed over to the investigating officer ('SP10') and an x-ray was conducted by Dr Farah Nadiah ('SP3') on all three individuals, who were found to have foreign objects in their abdomen. The appellant was transferred to Klang Hospital due to his condition and later to Kajang Hospital for an operation. Through an operation done at Kajang Hospital, Dr Johan ('SP4') managed to extract 46 capsules from the appellant's abdomen. All the capsules were handed over to SP10. The 46 capsules were later handed over to the chemist, Suhana Ismail ('SP1') who found all the capsules containing methamphetamine weighing 284.2g. The appellant was found guilty by the High Court for trafficking dangerous drugs and sentenced to death. On appeal, the appellant raised three main that comprised of: (a) whether the trial judge failed to consider there was serious doubt as to the identity of the drug exhibits and a break in the chain of evidence; (b) whether the trial judge failed to direct his mind as to under what section he had decided to ask the appellant to enter defence and under what section he convicted the appellant; and (c) whether the trial judge erred and misdirected himself in deciding that the appellant's

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defence was an afterthought, a bare denial and not credible.

Held, allowing the appeal in part and varying the conviction and sentence:

(1) The finding by the trial judge was correct that the identity of the drugs was intact, and the same drugs recovered were sent to the chemist by the investigating officer. The court was satisfied with the finding of the learned judge that the difference in weight was satisfactorily explained by the prosecution's witnesses. The discrepancy in the weight of the drugs did not cause any break in the chain in the prosecution's case. The court further agreed with the respondent's submission that when SP1 gave evidence, she gave evidence of facts and not of opinion. The court must accept SP1's evidence as true and credible because SP1's evidence was based on facts and not opinion. The court was of the view that the difference in weight of the drug exhibits by itself as found by SP10 and SP1 was not sufficient to create a reasonable doubt in the prosecution's case. The court had no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. There was no break in the chain of evidence of the drug exhibits. In fact, in the present appeal, there is no prejudice to the appellant as the gross amount was larger (456g) than the net weight (284.2g) (see paras 36 & 47–48).

(2) The court found that the trial judge had erred when he did not indicate at the prima facie stage whether the appellant's defence was called on direct or presumed trafficking. In the court's view, the trial judge ought to indicate the same as without the intimation, the appellant did not know what standards he was expected to meet, and there lay the prejudice against the appellant. It was unsafe to convict the appellant for trafficking. However, on the available evidence, the court found that the appellant may be found guilty for possession of the dangerous drugs (see paras 63 & 65).

(3) The court was satisfied that the trial judge had considered the appellant's defence. The trial judge found in essence his defence was that he had no knowledge that the capsules he swallowed contained dangerous drugs. The trial judge did not believe the appellant's defence and found it to be a bare denial and an afterthought. The court found that this issue had no merit (see paras 69–70 & 72).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi yang mendapati beliau bersalah atas pertuduhan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB 1952') dan menjatuhkan hukuman mati terhadapnya. Perayu merupakan warga Pakistan yang ditahan sebaik tiba di KLIA Sepang bersama dua individu lain. Selepas

ditahan, ketiga-tiga mereka dibawa ke pejabat narkotik di KLIA untuk siasatan lanjut. Selepas setengah jam, mereka dibawa ke Hospital Banting. Di hospital, ketiga-tiga mereka diserahkan kepada pegawai penyiasat ('SP10') dan x-ray telah dijalankan oleh Dr Farah Nadiah ('SP3') terhadap ketiga-tiga individu yang didapati mempunyai objek asing di dalam perut mereka. Perayu telah dipindahkan ke Hospital Klang kerana keadaannya dan kemudiannya ke Hospital Kajang untuk pembedahan. Melalui pembedahan yang dilakukan di Hospital Kajang, Dr Johan ('SP4') berjaya mengeluarkan 46 kapsul daripada perut perayu. Kesemua kapsul telah diserahkan kepada SP10. 46 kapsul tersebut kemudiannya diserahkan kepada ahli kimia, Suhana Ismail ('SP1') yang mendapati kesemua kapsul tersebut mengandungi methamphetamine seberat 284.2g. Perayu didapati bersalah oleh Mahkamah Tinggi kerana mengedar dadah berbahaya dan dijatuhi hukuman mati. Semasa rayuan, perayu membangkitkan tiga perkara utama yang terdiri daripada: (a) sama ada hakim perbicaraan gagal menimbangkan terdapat keraguan serius mengenai identiti ekshibit dadah dan putusnya rantaian keterangan; (b) sama ada hakim perbicaraan gagal mengarahkan fikirannya tentang seksyen apa yang beliau telah putuskan untuk meminta perayu membela diri dan di bawah seksyen apakah beliau mensabitkan perayu; dan (c) sama ada hakim perbicaraan terkhilaf dan tersalah arah dalam memutuskan bahawa pembelaan perayu adalah pemikiran semula, penafian kosong dan tidak boleh dipercayai.

Diputuskan, membenarkan sebahagian rayuan dan mengubah sabitan dan hukuman:

(1) Dapatan oleh hakim perbicaraan adalah betul bahawa identiti dadah tersebut adalah dalam keadaan baik, dan dadah yang sama yang ditemui dihantar kepada ahli kimia oleh pegawai penyiasat. Mahkamah berpuas hati dengan dapatan hakim yang bijaksana bahawa perbezaan berat telah dijelaskan dengan memuaskan oleh saksi-saksi pendakwaan. Percanggahan dalam berat dadah tidak menyebabkan sebarang putusnya rantaian dalam kes pendakwaan. Mahkamah seterusnya bersetuju dengan hujahan responden bahawa apabila SP1 memberi keterangan, beliau memberikan keterangan fakta dan bukan pendapat. Mahkamah harus menerima keterangan SP1 sebagai benar dan boleh dipercayai kerana keterangan SP1 adalah berdasarkan fakta dan bukan pendapat. Mahkamah berpandangan bahawa perbezaan berat ekshibit dadah dengan sendirinya seperti yang didapati oleh SP10 dan SP1 tidak mencukupi untuk menimbulkan keraguan munasabah dalam kes pendakwaan. Mahkamah tidak ragu-ragu bahawa ekshibit dadah yang dirampas daripada perayu dan seperti yang diperiksa oleh ahli kimia adalah ekshibit dadah yang sama yang didakwa terhadap perayu. Tiada putusnya rantaian keterangan eksibit dadah. Malah, dalam rayuan ini, tiada prejudis kepada perayu kerana jumlah kasar adalah lebih besar (456g) daripada berat bersih (284.2g) (lihat perenggan 36 & 47–48).

(2) Mahkamah mendapati bahawa hakim perbicaraan telah terkhilaf apabila beliau tidak menyatakan pada peringkat prima facie sama ada pembelaan perayu dipanggil secara langsung atau anggapan pengedaran. Pada pandangan mahkamah, hakim perbicaraan harus menyatakan sama seperti tanpa makluman, perayu tidak mengetahui standard yang beliau harapkan untuk dipenuhi, dan terdapat prejudis terhadap perayu. Ia adalah tidak selamat untuk mensabitkan perayu atas pengedaran. Bagaimanapun, berdasarkan keterangan yang ada, mahkamah mendapati perayu mungkin didapati bersalah kerana memiliki dadah berbahaya tersebut (lihat perenggan 63 & 65).

(3) Mahkamah berpuas hati bahawa hakim perbicaraan telah mempertimbangkan pembelaan perayu. Hakim perbicaraan mendapati pada dasarnya pembelaannya adalah beliau tidak tahu bahawa kapsul yang ditelannya mengandungi dadah berbahaya. Hakim perbicaraan tidak mempercayai pembelaan perayu dan mendapati ia adalah penafian kosong dan pemikiran semulan. Mahkamah mendapati bahawa isu ini tidak mempunyai merit (lihat perenggan 69–70 & 72).]

Cases referred to

Abdul Aziz a/l Jamal v PP [2016] MLJU 1606; [2016] 6 CLJ 485, CA (refd)
Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (folld)
Ali Hosseinzadeh Bashir v PP [2015] MLJU 2069; [2015] 1 CLJ 918, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Isidro Leonardo Quito Cruz v PP [2013] 2 MLJ 1; [2013] 2 CLJ 1025, FC (refd)
Jorge Crespo Gomez v PP [2020] 5 MLJ 250; [2020] 8 CLJ 292, FC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Luo Wenqin lwn Pendakwa Raya [2019] MLJU 294; [2019] 1 LNS 517, CA (refd)
Mazlan bin Mustaffa v Pendakwa Raya [2015] MLJU 2127, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pathmanabhan a/l Nalliannen v PP [2016] 1 MLJ 609; [2016] 1 CLJ 377, CA (refd)
PP v Hamid Shamsi Kavishashi [2015] MLJU 2251; [2015] 3 CLJ 789, CA (refd)
PP v Lam San [1991] 3 MLJ 426, SC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Roman Zolotarov v PP [2020] MLJU 915; [2020] 1 LNS 764, CA (refd)

Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 195, FC (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212, FC (distd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Tobechi Chinonso Madu v PP [2015] MLJU 2038; [2015] 1 LNS 57, CA (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2011] CLJ 381, FC (refd)
Ugonna Philip Nwankwo v PP [2016] MLJU 285; [2016] 2 CLJ 247, CA (refd)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327, SC (refd)
Yusmarin bin Samsudin v PP [1999] 4 MLJ 625; [1999] 4 CLJ 391, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), (da)(vi), 39A(2), 39B, 39B(1)(a), (2), First Schedule

Appeal from: Criminal Trial No 45A-141–12 of 2014 (High Court, Shah Alam)

Rajpal Singh (with Tiow Poh Nee) (Rajpal, Firah & Vishnu) for the appellant.
Mohd Zain Ibrahim (with Muhammad Azmi Mashud) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellant appeals against the decision of the High Court in finding him guilty of the charge for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') and sentence him to death.

[2] The charged under s 39B(1)(a) of the DDA 1952 reads as follows:

> Bahawa kamu pada tarikh 30/03/2014 jam lebih kurang 4.00 petang, bertempat di hadapan Pintu 5, Kawasan Ketibaan Aras 3, MTB KLIA Sepang di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu methamphetamine seberat 284.2 gram. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B (2) Akta yang sama.

[3] In this appeal, the appellant raised three main issues that comprise of:

(a) the learned trial judge erred and misdirected himself when he failed to consider that there was serious doubt as to the identity of the drug exhibits and break in the chain of evidence;

(b) the learned trial judge erred and misdirected himself when he failed to direct his mind as to under what section he had decided to ask the appellant to enter defence and under what section he convicted the appellant; and

(c) the learned trial judge erred and misdirected himself in deciding that the appellant's defence was an afterthought, a bare denial, and not credible.

[4] The appellant's counsel made an oral submission and also relied on his written submission and in conclusion, it was the appellant's contention that there is merit in the appeal and intervention of this court is required to set aside the decision which is plainly wrong. The appellant pray for an acquittal from the said charge.

[5] The deputy public prosecutor on behalf of the respondent ('DPP') contested the appeal and defended the decision of the High Court in convicting the appellant. The DPP made her oral submission and also relied on her written submission and concluded that the issues raised by the appellant have no merit. The DPP urged this court not to disturb the said decision and pray that the appeal be dismissed.

[6] We have considered the appeal and the issues raised by the appellant's counsel and the reply from the DPP. We find there is merit in the second issue that the trial judge failed to make an affirmative finding under what section he had decided to ask the appellant to enter defence and under what section he convicted the appellant.

[7] For the above reason, we find the conviction for trafficking of dangerous drugs under s 39B of the DDA 1952 is not safe. Hence, we allowed the conviction under s 39B of the DDA 1952 by the High Court to be set aside. However, with the available evidence adduced by the prosecution that we have re-examined, we are satisfied that the prosecution has established the case of possession of the said quantity of the drugs against the appellant under s 12(2) punishable under s 39A(2) of the DDA 1952.

[8] The appellant understood our decision. The appellant's counsel submitted mitigation on behalf of the appellant. The appellant's mitigations are mostly on the appellant's background life, his family, and being remorseful.

[9] The DPP replied by stressing the importance of public interest consideration. We were also reminded that the weight of the drugs is quite

substantial. The DPP cited some case laws showing the sentencing trends followed by the appellate court on or about the similar weight of drugs. The Court of Appeal had imposed imprisonment of 16 years to 18 years for possession of dangerous drugs.

[10] We have considered the appellant's mitigation and the DPP's reply. In deciding the appropriate sentence, we are guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. Each case, of necessity, must depend upon its own facts (*Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37, at p 38). In *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625; [1999] 4 CLJ 391, it was also held that the principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seized with such jurisdiction is empowered to consider the following the extent and seriousness of the offence committed; the guilty person's antecedents; and the public interest.

[11] In the present case, we have followed the sentencing principles. it is our unanimous decision that the appellant is sentenced to an imprisonment of 17 years from the date of arrest and ten strokes of whipping. In our view, this is the most appropriate sentence against the appellant.

[12] We give our reasons as follows.

BACKGROUND FACTS

[13] On 30 March 2014 at about 4pm three individuals from Pakistan arrived at KLIA International Airport. The three individuals are Masih Perviaz, Masih Faizal and Hussain Shahzad. Masih Pervez is the appellant in this appeal.

[14] At the arrival hall of the airport terminal, all three proceeded to the customs checkpoint after retrieving their luggage from the conveyor belt. The luggage underwent a routine scan at the customs.

[15] ASP Mohd Ashril bin Jonar (SP7) arrested the three individuals at Arrival Gate 5 of KLIA Sepang.

[16] Upon the arrest, all the three were taken to the Narcotic office on the third floor, KLIA for further investigation. After half an hour, they were brought to Banting Hospital. At the hospital, the three were handed over to Investigating Officer Inspector Azalina (SP10).

[17] At the Banting hospital an x-ray was conducted by Dr Farah Nadiah

(SP3) on all three individuals, and was found to have foreign objects in the abdomen. The appellant was transferred to Klang Hospital due to his condition and later to Kajang Hospital for operation.

[18] Through an operation done at Kajang Hospital, Dr Johan (SP4) managed to extract 46 capsules from the appellant's abdomen. All the capsules were handed over to SP10. The 46 capsules were later handed over to the chemist, Suhana Ismail (SP1) who found all the capsules containing methamphetamine weighed 284.2g.

THE DECISION OF THE HIGH COURT

[19] The trial judge found there is no dispute that the capsules extracted from the appellant's abdomen contained dangerous drugs listed under the First Schedule of the DDA 1952 weighing 284.2g as stated in the charge. The drugs were confirmed by SP1.

[20] However, the defence disputed the identity of the drugs which was said to have been tampered with. As a result, there are differences in the weight of the drugs. When the drugs were weighed with weighing machine at the hospital by the investigating officer (SP10), the weight was 456g. The same weight was found in police report (D34). But when the drugs were weighed by SP1, the weight becomes 444.78g lesser by 12g. The defence's case is that SP10 admitted she had made a cut on one of the 46 capsules but was not sure which capsule she had cut. It was submitted that the cutting was made before marking the capsules and before handing them over to SP1. Further, it was also submitted that SP10 did not state whether she had sealed the capsule. This may have caused the contents of the capsule to have been tampered with. There is no explanation from the witnesses and by this reason, the defence contended that there is a break of the chain of evidence on the identity of the said drugs.

[21] The trial judge rejected the appellant's contention and found there is no tampering of the said drugs. The decision is based on the evidence of SP4, SP5, SP8, SP10 and SP1 whose evidence as a whole did not show any break of the chain of evidence on the movement of the drugs. The trial judge referred to the case of *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 which held that the court must consider whether there is a break of chain of evidence or not with regards to the drugs exhibit. The trial judge has considered the appellant's submission and ruled that the issue of whether SP10 had made a cut on the capsule for testing is not a big issue or pertinent. He accepted SP1's explanation that in conducting her analysis, she had followed the Standard Operating Procedure ('SOP') issued by the chemistry department which includes three tests ie colour, qualitative and quantitative. SP1 found the net

weight of the drugs methamphetamine is 284.2g. The chemist report prepared by SP1 is exh P6.

[22] On the second issue whether the drugs were in custody and control of the appellant when he was arrested, the trial judge accepted the evidence of arresting officer, SP7 and SP7's evidence is not disputed. It is also not disputed that an x-ray was done on the appellant and found to have foreign objects in the abdomen and during operation 46 capsules were extracted from the abdomen. The capsules were identified by SP1 as methamphetamine weighing 284.2g. The trial judge referred to the decision in the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2011] CLJ 381 which held that where there is evidence the accused person had swallowed objects containing drugs, actual possession of the drugs is proven against him. The trial judge made a finding that the element of actual control with knowledge over the drugs had been proven against the appellant. In other words, mens rea possession of the said dangerous drugs was proven against the appellant.

[23] On the element of trafficking in dangerous drugs, the trial judge referred to the case of *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1; [2013] 2 CLJ 1025 where in that case there was indisputable and direct evidence that the appellant was in possession of the drugs in question. He admitted to swallowing them. It was not the appellant's defence that the drugs were for his own consumption. The large quantity of drugs involved raised a strong inference that it was not for his own personal consumption (see also *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764).

[24] Having considered the prosecution's case, the trial judge was satisfied that the prosecution had proved the charge against the appellant and called the appellant to enter his defence.

[25] The appellant chose to give evidence under oath. He did not dispute that the capsules were extracted from his abdomen. In essence, his defence was that he had no knowledge that the capsules he swallowed contained dangerous drugs. He said that before coming to Malaysia, his friend gave him a beer to drink and after drinking the beer, he passed out. At that particular moment, he felt like he had swallowed the capsules. While they were having the drink, his friend Akhbar Ali gave him a telephone number of a person in Malaysia for him to contact who will arrange for his finances and accommodation. However, before he could contact the person, he was arrested by the police.

[26] The appellant said that he was a student at Bostonweb College of Technology and Management, Kuala Lumpur since 2010. In May 2012, he came back to Malaysia to continue his study in the English language at the same college.

[27] At the end of the defence case, the trial judge did not believe the appellant's defence and found it as a bare denial and an afterthought. The defence's version was never put to the prosecution witnesses at the prosecution stage. The trial judge referred to *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 195 on defence 'afterthought'. The trial judge also found the defence's version that after drinking beer, he passed out and unconscious for two days before coming to Malaysia is illogical and does not make sense. The appellant's version is hearsay because Akhbar Ali was not called to give evidence citing the cases of *Ali Hosseinzadeh Bashir v Public Prosecutor* [2015] MLJU 2069; [2015] 1 CLJ 918 and *Public Prosecutor v Hamid Shamsi Kavishashi* [2015] MLJU 2251; [2015] 3 CLJ 789.

[28] The trial judge made a finding that the appellant's defence failed to create a reasonable doubt as explained in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 that reasonable doubt must be a doubt arising from evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence. In *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324, it says that a mere denial without proof to reasonably dislodge the prosecution's evidence is not sufficient.

[29] In conclusion, the trial judge rejected the appellant's defence. Hence, found the appellant's failed to cast reasonable doubt against the prosecution's case. The appellant is found guilty and convicted for the charge made against him. The appellant is sentenced to death.

ANALYSIS AND DECISION

First issue: The learned trial judge erred and misdirected himself when he failed to consider that there was serious doubt as to the identity of the drug exhibits and break in the chain of evidence

[30] This issue has been raised before the trial judge during the trial. The finding of the trial judge on this issue is at para 14 of the grounds of judgment. However, the appellant said, the decision is a misdirection. The gist of the submission is that when SP1 stated that the gross weight that she obtained was 444.78g, it differs from the gross weight of 456g obtained by SP8 and SP10. As such, the basic fact that can be obtained from the evidence is that there was a material discrepancy of 11.22g between the gross weight of the drug exhibits as found by SP1, SP8 and SP10.

[31] The appellant submitted that SP10 in D34 stated that she made a cut on one of the capsules to find out the content of the capsules. The appellant's case is that the cutting of the capsule involved not only the weight differences, tampering of drug exhibits but also a break in the chain of evidence. In addition

to that, there was no credible explanation with regard to the discrepancy and the tampering, be such on these points, the case for the prosecution collapsed. The appellant submitted that the evidence by prosecution's witnesses revealed that there was an unexplained serious discrepancy as to the gross weight of the drug exhibits. Clearly, this created a doubt as to the identity of the drug exhibits and whether the drug exhibits were tampered with before they were sent to SP1 for analysis or whether the drug exhibits recovered from the appellant were the same drug exhibits that were analysed by SP1.

[32] The appellant heavily relied on the case of *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 which, inter alia, held that the court must consider whether there is a break of the chain of evidence or not with regards to the drugs exhibit. In that case, there was no explanation given on the movement of the drug exhibit or where they were kept from 19 June 2008 to 24 June 2008 and from 24 June 2008 to 26 June 2008. As such the markings on the drug exhibit was not conclusive due to the huge differences in the weights given by the relevant witnesses.

[33] There was serious doubt on the identity of the drugs if the drug exhibit had been tampered with. There was a gap and a break in the chain of evidence in the prosecution's case relying on the Supreme Court case of *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, which held that where doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. The appellant also relied on *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212 and *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327 where the courts held that the discrepancies in the weight as found by the police and the chemist was fatal.

[34] In the Supreme Court case of *Yeong Kia Heng v Public Prosecutor*, the police officer's (SP5) gave evidence that the weight was 113g and the chemist's (SP2) gave evidence that when the drugs were received from the police, the weight was 102.85g. There was a difference of 10g. The court held that based on the evidence there was serious doubt on the identity of the drugs and defence was not called. Similarly, in *Tan Yew Choy v Public Prosecutor*, the Federal Court held that the appellant has shown there is a discrepancy in that the net weight of cannabis as determined by the chemist exceeded the gross weight of the cannabis and there were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant.

[35] The facts of the case in *Tan Yew Choy* in our view are different and can be distinguished with the facts in the present case. The court held that the discrepancies in the weight as found by the police and the chemist were fatal

because the total weight 'by the time the cannabis reached the hands of the chemist' had increased in weight by 19.65g. But another flaw in the case was that, the investigating officer did not explain the movement of the cannabis from the time he received and weighed them on 25 February 2005 until he placed them in a box on 27 February and sent it to the chemist on 28 February. In fact, in *Tan Yew Choy*, the pertinent issue was more on the failure of the trial judge in not resolving the doubt as to the weight of the cannabis as the weight of the cannabis involved was within the borderline amount that can trigger the statutory presumption of trafficking under s 37(da)(vi) of the DDA.

[36] We have considered the issue raised by the appellant and having perused the grounds of judgment and the record of appeal, it is our considered opinion that the finding by the trial judge was correct that the identity of the drugs was intact and the same drugs recovered were sent to the chemist, (SP1) by the investigating officer SP10. We are satisfied with the finding of the learned judge that the difference of the weight was satisfactorily explained by the prosecution's witnesses. The discrepancy in the weight of drugs did not cause any break in chain in the prosecution's case.

[37] The appellant never disputed that the 46 capsules were extracted from his abdomen and the type of drugs found by SP1. Upon this undisputed fact, in our view, firstly, even though the gross weight of the capsules is 456g stated by SP8 and SP10 is larger than the gross weight stated by SP1 which is 444.78g when she received the drugs exhibit, the fact remains that the net weight of the drugs substance found after analysis by SP1 is only 284.2g as stated in her report exh P6 for which the appellant was charged. Secondly, even if SP10 had made a cut in one of the capsules to find out the contents of the capsules, whether the marking of the capsules was made before or after SP10 made the cut is not a big issue or pertinent as decided by the trial judge. We agree with the trial judge on the reason that upon SP1's analysis of the same 46 capsules, she found the capsules contained net weight of 284.2g methamphetamine.

[38] The trial judge has also referred to *Lew Wai Loon v Public Prosecutor*, for him to consider whether there is a break of the chain of evidence or not with regards to the drugs exhibit. His finding is at para 14 in the grounds of judgment. In that case, the Federal Court decided as follows:

> [45] In relation to the differences in the weight given, the respective relevant witnesses gave their versions of the event including the reasons for weighing the drug exhibit.
>
> [46] SP9 made it clear that a bag together with the drug exhibit were given to him by SP7 for fingerprint tracing. Upon receipt he used an uncalibrated weighing machine to weigh the drug exhibit. He took the weight in relation to tracing for fingerprint. He learned from a course he attended that the weight of a thing could affect the result in determining fingerprint on it. Thus, the weight he obtained was

immaterial in determining the offence the appellant would finally be charged with. Hence, there was actually no necessity for him to explain. Nevertheless, his explanation on the weight issue could be inferred from the fact that he used uncalibrated weighing machine. Further, there was also no challenge that he received the drug exhibit from SP7.

[47] As for SP7 he said that he received the drug exhibit from SP1. Again there was no serious challenge on this issue. SP7 weighed them merely to countercheck on the weight as given by SP1. He was not sure whether the weighing machine he used was calibrated. Being the investigating officer it would be necessary for SP7 to know the estimated weight of the drug seized by SP1 as the weight would assist him to determine the nature of the offence committed and the course to take in his investigation of the case.

[48] The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial. Thus, there was no necessity for him to explain on the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncalibrated weighing machine easily explained for the weight discrepancy.

[49] There was no dispute that SP3, the chemist who analysed the seized drug used calibrated weighing machine to determine its weight.

[50] Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated weighing machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. And although their explanations might not have been necessary as stated earlier, nevertheless explanation was given or could easily be inferred from their testimonies unlike in *Zaifull* case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact, in the present case this weight issue was also considered by the learned trial judge and he ruled that there was no break in the chain of evidence thus rendering the weight issue immaterial in coming to his decision.

[39] The prosecution's evidence as we have analysed shows that the operation was done on the appellant on 2 April 2014, at 11.30am by Dr Johan (SP4) at Kajang Hospital assisted by Dr Amin (SP5) and Dr Umaparam (SP8). 46 capsules were recovered from the appellant, (estimated amount 456g), SP8 handed over the yellow plastic bag sealed with KKM Hospital Kajang which contained one plastic bag purple in colour, white colour plastic covered and sealed with KKKM Hospital Kajang which contained 46 capsules to SP10. The said yellow plastic bag with KKKM Hospital Kajang was marked by SP10 as 'A' dated 2 April 2014 and signed by SP10. 46 capsules marked as 'A1' until 'A46' dated 2 April 2014 and signed by SP10. She kept the items in her safe keeping in her office where no one had access except her. On 4 April 2014, 8am SP10 brought out the exhibit from her safe cabinet and put a seal on the exhibit. The item was in the care and custody of SP10 until she handed it over to SP1 on the

same date 4 April 2014 at 9am and was registered as 14-FR-B-10380. SP10 handed to SP1 together with POL 31 and SP10 received one receipt from chemist department from SP1. On 30 June 2014 SP10 received back the item, in an envelope marked 'A' sealed 129 PDRM, contained 46 capsules sealed with 14-FR-B-10380 and chemist report was for 14-FR-BS/10380 — methamphetamine with nett weight of 284.2g. At all material time, the exhibit was in the safe custody and care of SP10.

[40] SP1 gave an explanation that in conducting her analysis, she had followed the Standard Operating Procedure ('SOP') issued by the chemist department which includes three tests ie colour, qualitative and quantitative. SP1 found the net weight of the drugs methamphetamine is 284.2g. The chemist report prepared by SP1 is exhibit P6. SP1, where in her evidence during cross-examination, said gross weight was 444.78g for 46 capsules. She weighed the capsules by using calibrated Top Pan Balance. She carried out the three tests mentioned above assisted by two lab assistants Nurul Dalila and Jeremiah. At the end, SP1's analysis shows the capsules contained 284.2g of methamphetamine. SP1 produced P6. The trial judge accepted SP1's explanation in conducting her analysis. The respondent submitted that P6 was not challenged by the defence by calling any other expert witness to rebut SP1 analysis. We agree thus, P6 stands.

[41] From the above evidence and explanation, we are satisfied that each and every step taken by the prosecution witnesses was explained. In fact, the chemist did not require to go into details of what he did in the laboratory step by step. As long as the chemist is able to give credible evidence to support his opinion, the court is entitled to accept such opinion unless there is in rebuttal an opinion of another expert (*Pathmanabhan a/l Nalliannen v Public Prosecutor* [2016] 1 MLJ 609; [2016] 1 CLJ 377). In the present case, the trial judge had accepted SP1 evidence thus, no issue arises.

[42] In the Federal Court case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945, there was a difference of 171.45g in the gross weight. The court was of the view that an explanation by the prosecution would have been desirable, but on the facts and circumstances of this case, the court has no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. The difference in the gross-weight which is 171.45g less could be due to the fact that the drug exhibits were weighed by PW3 nearly three months after the drug exhibits were weighed by PW6. The court took judicial notice that environmental factors such as climate condition and humidity can attribute to the difference in weight of the impugned drug exhibits. What was decided in this case is as follows:

> ... the difference in weight of the drug exhibits by itself as found by the PW6 and the PW3 is not sufficient to create a reasonable doubt to the prosecution's case. We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses in particular PW4, PW6 and PW3. In fact, the identity of the drug exhibits was never challenged before the High Court. It had never been raised as an issue before the High Court as well as the Court of Appeal.

[43] It was also held that the weighing process by the police is not the determining factor in the weight of the drugs, rather it is the weighing done by the chemist which determines the actual weight of the drugs and forms the basis of the charge. It is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in the weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatuses used by the police force and the chemist department.

[44] The Federal Court referred to its earlier decision in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, which upheld the decision of the courts below even though there existed a discrepancy in the weight of the drug exhibits as found by the police and the chemist. In that case, the High Court as well as the Court of Appeal, found it as a fact that there was no doubt in the identity of the drug exhibits because the evidence before the court showed there was no break in the chain of evidence. The movement of exhibits was clearly explained, and the markings on the drug exhibits were positively identified by the witnesses. The courts below were satisfied that the drug exhibits that were seized from the appellant were the same exhibits produced in the High Court. The Federal Court decision is as follows:

> (1) The issue of discrepancy on the weight of the drug exhibits P7A & B had been extensively discussed by both the High Court and the Court of Appeal. The High Court, after a lengthy discussion on this issue, had taken the view that the prosecution's case should not fail just because the nett weight of the drug exhibits as found by the chemist was higher than the gross weight as found by the police. The drug exhibits recovered by PW3 was the same drug exhibits sent by PW8 to PW4 for analysis and subsequently produced in court as evidence. The High Court had no doubt as to the identity of the drug exhs P7A & B as there was no break in the chain of evidence as to their movement. The Court of Appeal had agreed with the finding of the High Court. Herein, the amount of the methamphetamine was 65.24g in excess of the amount of 50g to trigger the statutory presumption of trafficking under s 37(da)(xvi) of the DDA. The Court of Appeal was right in not following the cases of *Tan Yew Choy*, *Yeong Kia Heng* and *Yusri Pialmi* as binding precedent as the facts in those cases were distinguishable. In conclusion, the

A conviction of the accused on the charge of trafficking was safe. (paras 10, 19 & 21–22)

B **[45]** In the case of *Mazlan bin Mustaffa v Pendakwa Raya* [2015] MLJU 2127 the drugs exhibit has been marked properly by SP2 and SP8 before sending to the chemist department. This exhibit also has been identified by SP2, SP4 and SP8 in court. The court was satisfied that the drugs seized from the appellant and analysis by the chemist were the same drugs that were with the appellant. What is important is that the chain of evidence from the time the C drugs were found until the completion of the analysis by the chemist is not broken.

[46] In our considered view, the police who recorded the weight of 456g at the very beginning for the 46 capsules and cut one of the capsules is just to D know the gross weight and what was the substance of the capsules on the reason to believe that was the drugs and for classification purposes. The expert to determine whether the net weight of the drugs depends on the chemist and whether it falls under the Dangerous Drugs Act 1952. Both police enforcement and the chemistry department have their own methods and weighing machine E and of course, the former will find the higher weight as compared to the latter.

[47] We agree with the respondent's submission that when SP1 gave evidence, she gave evidence of facts and not of opinion. This is in line with the decision of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. The court must F accept SP1's evidence as true and credible because SP1 evidence was based on facts and not opinion. The case of *Public Prosecutor v Lam San* [1991] 3 MLJ 426, followed the decision of *Public Prosecutor v Munusamy* which, inter alia, says unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence and so G long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

[48] Similarly, on the facts and circumstances of the present case, we are of the view that the difference in weight of the drug exhibits by itself as found by H SP10 and SP1 is not sufficient to create a reasonable doubt in the prosecution's case. We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. There was no break in the chain of evidence of the drug exhibits. In fact, in this present appeal, there is no prejudice to the appellant as the gross I amount was larger (456g) than the net weight (284.2g). It would be prejudicial to the appellant if the facts were otherwise.

[49] We are satisfied that the learned trial judge has not misdirected himself. We find this first issue raised has no merit.

Second issue: The learned trial judge erred and misdirected himself when he failed to direct his mind as to under what section he had decided to ask the appellant to enter defence and under what section he convicted the appellant

[50] The appellant's counsel referred to the trial judge's decision at the end of prosecution's stage which held that:

> 25. Berdasarkan kepada keputusan kes-kes di atas, mahkamah ini berpuas hati bahawa elemen kawalan dan pemilihan OKT ke atas dadah tersebut dalam ertikata kawalan sebenar bersama pengetahuannya (men rea possession) telah dibuktikan oleh pihak pendakwaan terhadap OKT pada tahap prima facie.
>
> 26. Mengenai elemen pengedaran pula, saya merujuk kepada keputusan Mahkamah Persekutuan di dalam kes *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1; [2013] 2 CLJ 1025 ...
>
> 27. Rujuk juga kepada kes *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764.
>
> 28. Setelah membuat pertimbangan fakta-fakta kes pendakwaan pada tahap maksima. Saya berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kes mereka terhadap OKT. OKT dengan ini dipanggil untuk membela diri.

[51] While at the end of defence's stage, the learned trial judge held that:

> 55. Akhir sekali saya berpuas hati menolak pembelaan OKT ini dan mendapati bahawa OKT telah gagal untuk menimbulkan satu keraguan yang munasabah terhadap kes pendakwaan. OKT dengan ini didapati bersalah dan disabitkan kesalahannya sepertimana pertuduhan.
>
> 56. Memandangkan hanya satu sahaja hukuman yang diperuntukkan bagi kesalahan ini, maka mahkamah ini menjalankan kuasa yang termaktub itu dengan menjatuhkan hukuman mati terhadap OKT.

[52] It was submitted that apparently, from His Lordship's grounds of judgment at para 25, firstly the learned trial judge seemed to invoke s 37(da) indirectly. But the learned trial judge did not direct his mind whether the element of trafficking was successfully proven by the respondent under which section, either s 2 or through the presumption under s 37(da) before calling the appellant to enter defence. This is a serious non-direction that amounts to misdirection. In other words, at the end of the defence case, the appellant was convicted under s 39B(2) of the same Act. However, the learned trial judge did not make a specific finding on the issue of trafficking. The trial judge while giving his decision only directed his mind on the issue of whether the appellant failed to raise a reasonable doubt and then convicted the appellant.

[53] The case of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 was referred to by the

appellant's counsel who submitted that the Federal Court has affirmed the decision by this court vide Federal Court Criminal Appeal No 05–53–03 of 2014(B). The learned trial judge in this case held that possession and trafficking had been proven by either direct evidence or by invoking s 37(d) and (da) of the Act. The Court of Appeal held that:

> [21] In our view, the approach of not electing or making a finding on which presumption that was invoked but by merely relying on the alternative, is most undesirable. It reflects the uncertainty on the part of the trial judge to make a finding. The trial judge ought to make the necessary finding ie, whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before her. We are further of the view that it is important that such a finding be made as it impacts the burden placed on the defence.

[54] The same issue was also discussed in the case of *Roman Zolotarov v Public Prosecutor* [2020] MLJU 915; [2020] 1 LNS 764 where the appeal was allowed. It was held that there is a need to explain the difference between presumed trafficking and actual trafficking in relation to a drug trafficking charge as the appellant is facing. Actual trafficking is also referred to as direct trafficking in a number of decided cases. There are provisions in the Act that show the application of both presumed trafficking and actual trafficking. Likewise, for the present appeal, there is also no indication by the learned HCJ whether the appellant is convicted for presumed or actual trafficking. This accordingly is fatal and is a miscarriage of justice to the appellant (see *Abdul Aziz a/l Jamal v Public Prosecutor* [2016] MLJU 1606; [2016] 6 CLJ 485 and *Ugonna Philip Nwankwo v Public Prosecutor* [2016] MLJU 285; [2016] 2 CLJ 247 where the same principle is discussed in both and decided by Tengku Maimum Tuan Mat JCA (as Her Ladyship then was) and *Jorge Crespo Gomez v Public Prosecutor* [2020] 5 MLJ 250; [2020] 8 CLJ 292 by the Federal Court).

[55] It was submitted that the trial judge was confused and this is a serious misdirection by the learned trial judge. This method of making a finding in the alternative shows the uncertainty by the trial judge. This is prejudicial to the appellant as it was not clear on which burden the appellant was called to enter defence. If the finding of trafficking is by direct evidence under s 2, then the evidential burden on the appellant is to create a reasonable doubt on the prosecution's case. However, if the finding of trafficking is premised on the presumption under s 37(da), then there is a higher burden for the appellant to rebut, ie, on a balance of probabilities.

[56] Therefore, it is also clear that the trial judge did not make any finding on how did he came about convicting the appellant for trafficking. Then how could the appellant be convicted under s 39B(2) of the Act? There was no affirmative finding as to which section the trial judge was relying on. This had

seriously prejudiced the appellant as he was left wondering which burden of proof he ought to bear in order to prove his defence. The benefit of this doubt should be in favour of the appellant. It was, thus, unsafe to convict the appellant for trafficking.

[57] We have seen quite a number of instances where the appellant's counsel in other cases too raised the same issue like this in respect of a similar unclear decisions, made by the trial judge. We have allowed the appeal in those cases and set aside the conviction.

[58] The gist of appellant's submission is that in trafficking charges under the DDA 1952 there are two different types of the burden imposed on the accused depending on whether it was a case of direct or presumed trafficking. If it was a case of direct trafficking the onus of the defence is to raise a reasonable doubt whilst if it was a case of presumed trafficking or if any of the presumptions are invoked then the defence has to rebut the presumption on a balance of probabilities.

[59] We read the whole decision of the trial judge and at para 25 of the judgment, we agree that the trial judge merely decided that the prosecution had proved the element of custody and control over the drugs or actual possession (mens rea possession) against the appellant at the prima facie stage. At para 26, on trafficking, he merely referred to the Federal Court of *Isidro Leonardo Quito Cruz v Public Prosecutor*. We agree with the appellant's submission that the trial judge seemed to invoke s 37(da) indirectly. But the learned trial judge did not direct his mind whether the element of trafficking was successfully proven by the respondent under which section, either s 2 or presumption under s 37(da) before calling the appellant to enter defence.

[60] This, in our considered view, has prejudiced the appellant in that the defence would probably have to call witnesses to meet that standard whilst in a case where the standard is that of a reasonable doubt the accused can generally take advantage of the infirmities in the case of the prosecution. Without the intimation, the appellant would not know what standards he was expected to meet. In other words, in trafficking charges under the DDA there are two different types of burden imposed on the accused depending whether it was a case of direct or presumed trafficking. If it was a case of direct trafficking the onus on the defence is to raise a reasonable doubt whilst if it was a case of presumed trafficking or if any of the presumptions are invoked then the defence has to rebut the presumption on a balance of probabilities. Had the High Court judge undertaken a maximum evaluation the court would have no difficulty to inform the appellant what was the nature of trafficking or whether any presumption had been invoked.

[61] This principle has been explained in *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* where it was held that:

> (2) The trial judge had invoked both presumptions under s 37(d) and (da) of the DDA in the alternative. The trial judge must make a finding as to which presumption was relied upon as there had to be a certainty as to the presumption before the defence was called. If the trial judge had resorted to the presumption in calling the defence, the law required that the trial judge applied the test of balance of probabilities in considering whether the appellant had rebutted the presumption. There was no application of the test of balance of probabilities by the trial judge. (paras 19–20).
>
> (3) The approach of not electing or making a finding on which presumption was invoked but merely relying on the alternative was most undesirable. The trial judge ought to make the necessary finding of whether there was actual or presumed possession and whether it was presumed or actual trafficking. It reflected the uncertainty of the part of the trial judge. Such finding was important as it impacted the burden placed on the defence. The failure of the trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption amounted to a misdirection by way of non-direction which had prejudiced the appellant. (paras 21 & 23).

[62] In another case of *Ugonna Philip Nwankwo v Public Prosecutor* the trial judge found that the prosecution had proved its case beyond reasonable doubt and thereby convicted and sentenced the appellant to death. On appeal, the appellant contended, inter alia, that: (i) the trial judge had erred in failing to make a definite finding as regards to the second charge ie (a) whether it was a case of deemed possession under s 37(d) of the Act read with the acts of trafficking under s 2 of the Act or (b) whether it was case of actual possession read with the trafficking presumption under s 37(da) of the Act; (ii) the trial judge erred in failing to rule whether s 37(da) presumption had been rebutted; and (iii) Moses and Sani Wahab were not called by the prosecution and not offered to the defence. In allowing the appeal; setting aside conviction and sentence of the High Court, Tengku Maimun Tuan Mat JCA (now CJ) held that:

> (1) Reading the grounds of judgment as a whole, there was a doubt whether the prima facie case on the second charge was premised on presumed possession under s 37(d) of the Act and trafficking under s 2 of the Act or whether it was on actual possession and presumed trafficking under s 37(da) of the Act. The approach of the trial judge in merely relying on the alternative without electing or making a finding whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence amounted to a misdirection. (paras 25 & 27).
>
> (2) As for the first charge, the trial judge had invoked the presumption of trafficking under s 37(da) of the Act. However, nowhere in the grounds of judgment of the trial judge did Her Ladyship made a finding of possession. Apart from the failure of the trial judge to make an affirmative finding of possession in respect of the first charge,

Her Ladyship had also failed to make a finding of whether the appellant had rebutted the presumption of trafficking under s 37(da). This omission was a material misdirection warranting appellate intervention. (paras 28 & 30).

[63] We find the trial judge has erred when he did not indicate at the prima facie stage whether the appellant's defence was called on direct or presumed trafficking. At para 28 of the judgment he clearly states 'saya berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kes mereka terhadap OKT. OKT dengan ini dipanggil untuk membela diri'. In our view, the trial judge ought to indicate at the prima facie stage whether the appellant defence was called on direct or presumed trafficking. Without the intimation, the appellant did not know what standards he was expected to meet, there lies the prejudice.

[64] As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction (see *Tunde Apatira & Ors v Public Prosecutor).*

[65] We have found that it was unsafe to convict the appellant for trafficking. However, on the available evidence, we find the appellant may be found guilty for possession of the dangerous drugs. In *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, at p 802, the Federal Court held that the Court of Appeal is empowered to review or re-evaluate all the evidence adduced by the prosecution, not withstanding that the High Court's decision lacked specific findings and contained no reasons for its findings. In a case involving pure question of facts, the Court of Appeal is free to determine whether the various findings of the trial court are correct. In the instant case, although the High Court's decision was of no assistance, the Court of Appeal had considered and subjected all the evidence adduced by the prosecution to a critical re-examination.

[66] In the present case, we agree with the finding of the trial judge on actual possession of the drugs. The trial judge accepted the evidence of arresting officer, SP7 and SP7's evidence is not disputed. It is also not disputed that an x-ray was done on the appellant and found to have foreign objects in the abdomen and during operation 46 capsules were extracted from the abdomen. The capsules were identified by SP1 as methamphetamine weighing 284.2g. The facts are similar to that of *Tunde Apatira & Ors v Public Prosecutor* which held that where there is evidence the accused person had swallowed objects containing drugs, actual possession of the drugs is proven against him. Similarly, in *Isidiro Leonardo Quinto Cruz v Public Prosecutor* was indisputable and direct evidence that the appellant was in possession of the drugs in

question. He admitted to swallowing them.

Third issue: The learned trial judge erred and misdirected himself in deciding that the appellant's defence was an afterthought, a bare denial, and not credible

[67] The appellant's defence is that he did not know that there were drugs in his abdomen, neither the nature of the capsules. The appellant had constantly told that he did not have knowledge about the drugs until he was told by the hospital. The appellant submitted that he already put in his defence when his statement was recorded after three days of his operation. His cautioned statement was tendered and marked as an exh D35 before the learned trial judge. However, in the grounds of judgment, apparently the learned trial judge failed to consider the appellant's cautioned statement D35 which stated that he did not know that there were foreign objects in his body. This is a serious non-direction warranting appellate intervention.

[68] It is the appellant's case that the learned trial judge erred and misdirected himself when he decided that the appellant's defence was an afterthought and never put to the prosecution's witnesses.

[69] We considered this issue however, we are satisfied that the trial judge has considered the appellant's defence. We have analysed the appellant's caution statement in exh D35. His defence under oath is the same as his caution statement in exh D35. The appellant did not dispute that the capsules were extracted from his abdomen. The trial judge found in essence his defence was that he had no knowledge that the capsules he swallowed contained dangerous drugs. When he was drinking the beer, he passed out and at that moment he felt like he had swallowed the capsules.

[70] The trial judge did not believe the appellant's defence and found it as a bare denial and an afterthought. The defence's version was never put to the prosecution witnesses at the prosecution stage. The trial judge referred to *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 195 on defence 'afterthought'. The trial judge also found the defence's version that after drinking beer, he passed out and unconscious for two days before coming to Malaysia is illogical and cannot be accepted.

[71] Akhbar Ali's name was mentioned by the appellant in his defence and in D35. The appellant said that Akhbar Ali gave him a telephone number of a person in Malaysia for him to contact. The trial judge found the appellant's version is hearsay because Akhbar Ali was not called to give evidence (see *Ali Hosseinzadeh Bashir v Public Prosecutor* and *Public Prosecutor v Hamid Shams Kavishahshi*. We agree with the trial judge's finding. We are also of the considered view that mentioning of Akhbar Ali's name alone does not comply

as a notice to the prosecution following the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 for the reason that the appellant failed to give a complete description of Akhbar Ali, the full name, address and telephone number for further investigation. Be that as it may, the existence of Akhbar Ali was never proved by the appellant (see also *Luo Wenqin lwn Pendakwa Raya* [2019] MLJU 294; [2019] 1 LNS 517 *Tobechi Chinonso Madu v Public Prosecutor* [2015] MLJU 2038; [2015] 1 LNS 57).

[72] We find this issue has no merit.

CONCLUSION

[73] We find the conviction for trafficking of dangerous drugs under s 39B against the appellant is not safe. Instead, the prosecution has established the case of possession of the said quantity of the drugs against the appellant. The conviction for trafficking of dangerous drugs under s 39B by the High Court is set aside. The appellant is convicted for possession of methamphetamine weighing 284.2g under s 12(2) punishable under s 39A(2) of the DDA 1952 and sentenced to an imprisonment of 17 years from the date of arrest and ten strokes of whipping.

Appeal allowed in part and conviction and sentence varied.

Reported by Michelle Yee